SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 227

ANTHONY RUSSO,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

STATE'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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The Respondent, The State of New Jersey, prays that this Court deny Petitioner's request, in this matter, for a writ of *certiorari* to review the opinion and judgment of the Supreme Court of the State of New Jersey.

Counter-Statement of Facts

Anthony Russo, hereinafter referred to as Petitioner, was indicted by the Monmouth County Grand Jury for

Perjury and False Swearing contrary to the provisions of N.J.S. 2A:131-1 and N.J.S. 2A:131-4. After a trial before the Honorable M. Raymond McGowan, J.C.C., and a jury on May 28, 1968, which ended in a hung jury, the Petitioner was tried a second time before Judge McGowan and a jury on October 28, 29, and 30, 1968, the petitioner was sentenced by Judge McGowan for a term of not less than three and not more than five years at the State Prison as well as fined $2,000.00.

Petitioner then filed an appeal with the Superior Court-Appellate Division. The matter was argued on December 22, 1969. The Appellate Division affirmed the judgment of conviction on January 15, 1970 (Pa A1a). Petitioner then brought a petition for certification to the Supreme Court of New Jersey which was subsequently denied (*State* v. *Russo*, 55 N. J. 455 (1970)).

A Grand Jury for the County of Monmouth was convened, for the September 1967 Session, to conduct a general investigation of the Government and Police Department of the City of Long Branch. (See Record, Appellant's appendix to the Superior Court of New Jersey, Appellate Division, Aa 133a, 19). Anthony Russo was subpoenaed to appear and did in fact appear before the Grand Jury on October 31, 1967. At the general inquiry conducted by the Grand Jury, Petitioner was questioned at length about a meeting he had on April 24, 1967 with three police officers and about a statement he was alleged to have made to those men (Record, Aa 120a-133a). He denied ever stating to Trooper Castellano at that meeting that "I got the Mayor in my pocket, I got three Councilmen and tonight or tomorrow night I'll have the fourth Councilman" (Record, Aa 128a, 11-17). This denial under oath to the Grand Jury of Monmouth County formulated the basis for indicting the Petitioner for perjury and false swearing.

Reasons for Denying the Writ

The State of New Jersey respectfully submits that the investigation conducted by the Grand Jury of Monmouth County was a general investigation into the affairs of the City of Long Branch prompted by, among other things, a complaint by Milton Garr and the City-wide Civic Association of Long Branch that Thomas Pesano, Police Chief of Long Branch, was hampered in the administration of his duties. That is, the record clearly demonstrates that the Grand Jury inquiry was general and not accusatory or aimed particularly at the Petitioner, Anthony Russo. Russo appeared before the Grand Jury as neither the accused nor a potential defendant in a criminal proceeding but merely as one witness in a general probe into the affairs of the City of Long Branch and its police department.

In inquiries by the Grand Jury which are of a general rather than an accusatory nature, it has been established in New Jersey as well as other jurisdictions that the prosecutor has no duty to warn or apprise any witness of his constitutional privilege against self-incrimination or his right to remain silent. *United States* v. *Di Giovanni*, 397 F. 2d 409 (7th Cir. 1968); *Cargill* v. *United States*, 381 F. 2d 849 (10th Cir. 1967), *certiorari* denied 389 U. S. 1041 (1968); *United States* v. *Di Michele*, 375 F. 2d 959 (3rd Cir. 1967), *certiorari* denied 389 U. S. 838 (1967); *United States* v. *Rosen*, 353 F. 2d 523 (2nd Cir. 1965), *certiorari* denied 383 U. S. 908 (1966); *United States* v. *Winter*, 348 F. 2d (2nd Cir. 1965), *certiorari* denied 382 U. S. 955 (1965); *United States* v. *Parker*, 244 F. 2d 943 (7th Cir. 1957), *certiorari* denied 355 U. S. 836 (1957); *State* v. *Fary*, 19 N. J. 431 (1955). In *State* v. *Fary*, *supra*, the facts were analogous to the case *sub judice*. There, the 1952 May term of the Monmouth County Grand Jury conducted an inquiry into the operations of the

Ocean Township road department without handing up indictments but instead filed a presentment sharply criticizing the laxity of "elected Township Officials" in supervising purchasing practices. The January 1953 Term Grand Jury reopened the inquiry and subpoenaed Benjamin and Harry Fary, who sold gravel to Ocean Township, and Bruce Vogel, the Township's Road Foreman, who ordered the gravel for the township from them. At the Grand Jury inquiry the Farys and Vogel testified without being told first of the rights as to their privilege against self-incrimination. The Grand Jury then indicted the Farys for alleged cheats and frauds in the sale of gravel to the township and indicted Vogel for allegedly aiding and abetting them. On appeal to the Supreme Court of New Jersey alleging a denial of their constitutional privilege to remain silent and not incriminate themselves, the Honorable William J. Brennan, Jr. speaking for the court stated:

> "From what appears in the record before us, the grand jury which indicted appellants was conducting a general inquiry, of familiar form, into the conduct of the Ocean Township Road Department. The subpoenas were expressly so captioned. The appellants were not under formal criminal charges when they testified. The strongest case that can be made for their position is that they were at the time under suspicion of wrongdoing. The authorities cited establish that, of itself, this would not be sufficient reason for invalidating their indictment because they were not warned. In addition, while the complete list of the witnesses who testified at the inquiry is not in the record, it is strongly implied on appellants' brief that other witnesses did testify and the parties' stipulation identifies one, Benjamin Fary's daughter, who testified from the Fary books. Not only, then, does the record show

a general inquiry by the grand jury, but the prospect cannot be ruled out that the indictments may well have been founded on evidence obtained from other witnesses. The grand jury's investigation was an inquiry undertaken, not to connect the appellants with a particular offense, but for the common purpose of such general inquiries, to discover whether there was anything criminally or otherwise irregular about the operations of the township road department and, if so, who were the responsible parties. The fact that the appellants were intimately identified with the operations under investigation made them logical witnesses to give evidence and if their disclosed participation in any violations of law uncovered by the inquiry warranted their indictment, the grand jury's action is not to be stricken down merely because they were not warned of their privilege. Such general grand jury investigations are essential in the public interest and it would greatly limit if not destroy their utility if every witness questioned during their course were to be immune from prosecution. See 49 *Yale L.J., supra,* p. 1072." (*Fary, supra*)

The facts in the instant case are very similar to those in *Fary.* The Grand Jury inquiry was a general investigation of the affairs of the City of Long Branch. The Petitioner, Russo, was not under formal criminal charges when he testified. Many other witnesses besides the Petitioner testified before the Grand Jury pursuant to the complaint of Garr and the Civic Association to determine if there was anything criminal or otherwise irregular about the affairs of the City of Long Branch and the operation of its police department.

The State of New Jersey respectfully submits that, as in *Fary, supra,* the inquiry conducted by the Grand Jury in

the instant case was a general and not an accusatory investigation and, therefore, the State was under no obligation to apprise the Petitioner or any other witness before the Grand Jury as to their right to remain silent and their privilege against self-incrimination.

Petitioner's argument seems to rest on the allegation that he was, in fact, a target of the Grand Jury investigation. Petitioner goes to the extreme in stating that the opinion of the New Jersey Superior Court, Appellate Division states "in fact" that he was such a target (Pb6). In its opinion, the Appellate Division stated:

> "*Assuming* defendant was a target of the grand jury investigation, the Fifth Amendment mandate against compelling a person to be a witness against himself is unrelated to perjury" (emphasis added) (Pa A 2a)

It is clear that the Appellate Division never intended that such a fact could be inferred from its opinion.

Assuming *arguendo*, however, that Petitioner was such a target of the Grand Jury investigation, the State of New Jersey submits that when the Petitioner was subpoenaed to testify before the Grand Jury there was no existing information with which to indict him for any crime. That is, the Petitioner was not subpoenaed to testify as to any self-incriminating matter implicating him in a crime committed previous to his appearance before the Grand Jury. The Grand Jury had no evidence before it of any prior crimes that were committed by Petitioner and therefore had no evidence upon which an indictment could be issued against him. Testifying as to the truth about the transactions between himself and the police officers would not have put the Petitioner in jeopardy of indictment for bribery of a government official,

N.J.S. 2A:93-6, or any other crime. N.J.S. 2A:93-6 deals with bribery of a government official by receiving or giving or offering to receive or give money, real estate, something of value, etc. The statement Petitioner allegedly made to the three police officers in no way could have been interpreted to mean that money, real estate, etc. was given or received in the transaction between the parties, and therefore the facts before the grand jury, if admitted by Petitioner, were insufficient to indict defendant for violating N.J.S. 2A:93-6. The Petitioner was attributed to have said, "We can take care of the Mayor, we got three Councilmen tonight or tomorrow, we'll have number four."

In support of his argument, Petitioner cites the cases of *State* v. *Ruggeri*, 429 P. 2d 969 (Utah 1967); *State* v. *Byington*, 200 P. 2d 723 (Sup. Ct. Utah 1948); *State* v. *Caperton*, 276 Mo. 314, 207 S.W. 795 (1918). It must be noted that in each of these cases defendant was faced with the dilemma of either confessing to a crime or perjuring himself. This was not the situation in the instant case. By truthfully answering the question of whether he in fact said that to the officers, Petitioner would not have incriminated himself of any crime. The evidence was sufficient to charge the Petitioner only with braggadocio but not bribery, obstructing justice, or any other crime against the State of New Jersey.

It is a well settled point of law that one does not have the right to invoke the Fifth Amendment when the answer to the question put to the witness would not have a direct tendency to incriminate him. See *O'Connell* v. *United States*, 40 F. 2d 201, 204 (Ct. of App. 2nd Cir. 1930), appeal dismissed 296 U. S. 667 (1935) where the Court stated:

> "As to the second branch of the argument, the refusal to answer certain questions under the claim

of privilege will first be examined. Here only questions as to which the privilege was claimed need be considered. The grand jury was investigating a lottery, a subject within its jurisdiction as lotteries almost always involve some use of the mails. 18 USCA § 336. The questions asked were apparently relevant, or at least were a proper introduction to further inquiries, which might elicit information that would lead to prosecution of crime. The appellant was not privileged to refuse to answer unless his answer would have a direct tendency to incriminate him; *a remote or speculative possibility of danger is not enough.*" (emphasis added).

The court went on to state:

"The final contention of the appellant is that, regardless of the details of his examination, it was a violation of his rights under the Fifth Amendment to require him to be sworn and examined before the grand jury, because its investigation, though ostensibly general, was in reality an attempt to secure from his own mouth evidence upon which to indict him. * * * As Prof. Wigmore has aptly said, the constitutional provision is 'an option of refusal and not a prohibition of inquiry.' Were it otherwise, any suspect would be sacrosanct, and witnesses most likely to know the facts could refuse any aid to an investigation of the crime. The mere summoning of a witness before the grand jury gives no basis for the assumption that his constitutional privilege will be impaired. His duty is to answer frankly until some question is propounded, *the answer to which might tend to self-incrimination.*" *Supra,* at 205 (Emphasis added).

See also *Quinn* v. *United States*, 203 F. 2d 20 (U. S. Ct. of App., Dist. of Col. Circ. 1952), reversed on other grounds 349 U. S. 155 (1955) and *Mason* v. *United States*, 244 U. S. 362 (1916).

Although these cases deal with situations in which the witness knew of his right to invoke the Fifth Amendment, the law they state is that one cannot invoke this right unless asked an incriminating question. Since the questions asked upon which Petitioner perjured himself were in no way, incriminating, he never had a right to invoke the Fifth Amendment. The State of New Jersey therefore respectfully submits that the prosecutor was under no duty to advise Petitioner of a right which the Petitioner did not possess.

The State of New Jersey further submits that *State* v. *Sarcone*, 96 N. J. Super. 501 (Law Div. 1967), is distinguishable and therefore not binding on the case *sub judice*.

In *Sarcone* the Grand Jury investigation was not general in scope as the Grand Jury investigation was in the present matter. Moreover, the defendant in that case was the target of the investigation and had committed the crime, for which he was eventually indicted, *before* his appearance at the inquiry. That is, prior to the inquiry the Grand Jury had sufficient evidence to indict the defendant for the crime that he was subsequently indicted for after the inquiry. Finally, it should be noted that the defendant in *Sarcone* was not charged with perjury before the Grand Jury, as Russo was in the instant case, but with the substantive crimes committed prior to testifying before the Grand Jury. The State contends that *Sarcone* is inapplicable to the matter *sub judice* and that the Petitioner in the instant case was not denied his constitutional rights or privileges.

Petitioner has failed to show any substantial question for this Court to determine. The law concerning the rights of an individual before a grand jury investigation, whether or not he is a target or a potential target of that investigation, is well settled in regards to perjury and the Fifth Amendment right to refuse to testify. In his quest for further review of his conviction, Petitioner has attempted to create the picture of a situation which never existed that he was in fact a target of the Grand Jury Investigation. The failure of Petitioner to meet the requirements of *Supreme Court Rule 23:4* should alone be reason for denying the writ.

CONCLUSION

For these reasons, and authorities cited in support thereof, the State of New Jersey respectfully urges that this Court deny Petitioner's petition for certiorari.

Respectfully submitted,

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